IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 257 and 258

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, and AMERICAN SOCIETY OF TRAVEL AGENTS, INC.,

Petitioners,

—v.—

AKTIEBOLAGET SVENSKA AMERIKA LINIEN (Swedish American Line); AMERICAN EXPORT ISBRANDTSEN LINES, INC.; AMERICAN PRESIDENT LINES LTD.; BALTIC STEAMSHIP LINE; CANADIAN PACIFIC RAILWAY COMPANY (Canadian Pacific Steamships); COMPAGNIE GENERALE TRANSATLANTIQUE (French Line); COMPANHIA COLONIAL DE NAVEGACAO (C. C. N.—The Portuguese Line); COMPANIA TRASATLANTICA ESPANOLA, S. A. (Spanish Line); THE CUNARD STEAM-SHIP COMPANY LIMITED; DEN NORSKE AMERIKA-LINJE A/S, OSLO (Norwegian America Line); DONALDSON LINE LIMITED; EUROPA-CANADA LINIE, G. M. B. H. (Europe-Canada Line); GENERAL STEAM NAVIGATION CO. LTD. OF GREECE, TRANSATLANTIC SHIPPING CORP., TRANSOCEANIC NAVIGATION CORPORATION, ARCADIA STEAMSHIP CORPORATION (Greek Line); GIACOMO COSTA FU ANDREA, GENOA (Costa Line); HAMBURG-ATLANTIK LINIE G. M. B. H. (Hamburg-Atlantic Line); HOME LINES INC. (Home Lines); "ITALIA" SOCIETA PER AZIONI DI NAVIGAZIONE (Italian Line); N. V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ "HOLLAND-AMERIKA LIJN" (Holland-America Line); NATIONAL HELLENIC AMERICAN LINE S. A. (National Hellenic American Line); NORDDEUTSCHER LLOYD (North German Lloyd); POLISH OCEAN LINES (Gdynia America Line); UNITED STATES LINES COMPANY (United States Line); and ZIM ISRAEL NAVIGATION COMPANY LTD. (Zim Lines), constituting the Member Lines of either or both the TRANSATLANTIC PASSENGER STEAMSHIP CONFERENCE and the ATLANTIC PASSENGER STEAMSHIP CONFERENCE,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

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ARGUMENT

I. The Evidentiary Standard Urged by Respondents Is Inapposite.

Respondents' brief relies on cases dealing with the standard of review applicable to quasi-judicial findings of past statutory violations.[1] Those cases have no bearing on regu-

[1] Resp. Br. 36-39; *Federal Trade Commission* v. *Raladam*, 283 U. S. 643 (1931), arose from an FTC complaint and finding that

lation by the Commission of future collective action by competitors under the Shipping Act. No fines or penalties were imposed on respondents. The Commission's disapproval of the unanimity and tieing rules did not have to turn on an issue of fact as to whether respondents did, or did not commit, a past act in violation of the statute.

Although there is substantial evidence of past violations of the Shipping Act caused by the rules in question (*see* Gov't Br. 17-26; ASTA Br. 41-49), the Commission was also entitled to rely on its opinion as to the rules' future effects upon commerce and the public interest. As respondents point out (Resp. Br. 8-11), they have not operated without the unanimity and tieing rules,[2] and therefore there could be no precise evidence as to what would happen without them.

Administrative expertise in making determinations where there are such "uncertainties, imponderables and estimates" has been held by the court below to be particularly significant, warranting more restrained judicial review than that given quasi-judicial action of agencies. *American Airlines* v. *Civil Aeronautics Board,* 192 F. 2d 417 (D. C. Cir. 1951). In considering the application of a public interest test by the C. A. B., the D. C. Circuit pointed out (192 F. 2d at 420):

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there had been unfair competition in the sale of an obesity cure; *National Labor Relations Board* v. *Brown,* 380 U. S. 278 (1965), involved an NLRB determination that an illegal lock-out had occurred.

[2] When the TAPC agreement was *first* submitted for Commission approval in 1929, it contained no unanimity rule (App. 124-26a); although this provision apparently was never followed by respondents, they nevertheless represented to the Commission initially that they had the right of independent action, a point which further invalidates their reliance upon prior administrative approvals.

> "* * * the regulatory function * * * is a forward-looking function * * *. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure to observe that distinction. When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability."

See also Connecticut Committee Against Pay-TV v. *Federal Communications Commission,* 301 F. 2d 835 (D. C. Cir. 1962).

The expertise which the court below has held to be of such consequence is important here not in recognizing the antitrust implications of the unanimity and tieing rules (which are obvious), but in evaluating Shipping Act policy and need for those rules. Respondents gloss over findings made by the Commission that no such need had been shown and contend that the Commission must approve the rules because they have always had them and they have long been approved. But this contention was held to be "without merit" by the court below (App. 521a) and cannot now support imposition of a higher standard of proof.[3] The

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[3] *See Baltimore & Ohio Railroad* v. *Jackson,* 353 U. S. 325, 330-31 (1957), discussed in ASTA Br. 29-30.

conclusion reached by the Commission in carrying out its regulatory function was well "within the realm of rational deduction or inference" and should not have been upset by the court below "despite differences of opinion". *American Airlines* v. *C. A. B., supra,* at 420.

II. No Conflict With International Policies Exists Here.

The Commission's disapproval of the unanimity and tieing rules does not interfere with respondents' operations abroad or create any international conflicts. This case concerns respondents' control over sales made by, and commissions paid to, agents within the United States. Collision in national policies is no more possible in regulation under the Shipping Act of treatment given United States travel agents by respondents than in regulation under the Fair Labor Standards Act of employment by respondents within the United States. *See, e.g., Caserta* v. *Home Lines Agency, Inc.,* 273 F. 2d 943 (2d Cir. 1959) (holding federal minimum wage law applicable to an employee who served as a passenger ticket agent in the United States for foreign steamship lines, including certain of respondents herein).

Respondents' references to the 1961 views of the State Department (Resp. Br. 4-5) are inapposite. The State Department had commented on a proposed amendment to the Shipping Act calling for mandatory production of documents, wherever located. Since this amendment would have required a foreign shipping line to pledge the availability of documents irrespective of any orders its own government might give, the Department of State urged further

consideration of the amendment, which resulted in its modification by the Senate.[4]

In *Federal Maritime Commission* v. *DeSmedt*, 366 F. 2d 464, 472-73 (2d Cir. 1964), *cert. denied*, 385 U. S. 974 (1966), the Second Circuit ordered production by foreign steamship lines of documents outside the United States, despite the views of the State Department referred to by respondents herein. In *Federal Maritime Commission* v. *New York Terminal Conference*, 373 F. 2d 424 (2d Cir. 1967), which also required production of documents by steamship lines, including certain respondents herein, the same court noted that the Commission has the power (373 F. 2d at 427):

> "• • • to terminate an exemption from the antitrust laws which was being misused • • • —action more feasible than it may usually be with respect to foreign commerce when, as here, the agreement concerns only terminal services in an American port."

As in the *Terminal Conference* case, the agreement herein concerns only those activities of respondents affecting agents in America. The order of the Commission now before the Court is well within the scope of action held to be consistent with national policy and not in conflict with this country's international relationships.

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[4] *See* LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. Doc. No. 100, 87th Cong., 2d Sess., 139-44, 223-24 (1962).

III. Facts Relied on by Respondents Do Not Support the Propositions Advanced.

Much of respondents' brief is devoted to arguments intended to show that there is evidence to support a conclusion contrary to that reached by the Commission. This provides no basis for reversing the Commission.[5] Moreover, as illustrated by the following examples, respondents' references, when viewed in context, generally do not support the propositions for which they are advanced:

1. Respondents assert that the commission ceiling has been increased on various occasions, that they regularly consider this matter and that unanimity has really not blocked anything (Resp. Br. 14-16). But the period referred to, during which maximum commissions for the high season rose from 6% to 7%, covers more than 20 years. And, respondents' assertion to the contrary notwithstanding, the change in the commission rate from 7½% to 7% for the 1957 off-season was not a "raise" (Resp. Br. 15). Moreover, consideration of the proper level of compensation to agents is no substitute for action sought by the majority of lines.

2. Respondents excerpt from testimony of one agent the suggestion that an increase in steamship commissions might not result in increased steamship travel (Resp. Br. 22, n. 37). That witness concluded:

> "I never expected that the increase [in commissions] can change the percentage of [steamship] sales so sig-

[5] *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 619-20 (1966) (ASTA Br. 20, 35-40).

nificantly in the first year to jump from 20 to 40 [per cent]. *But I do believe that this would support an increase to a certain degree.* * * * And I believe * * *, that agents have to get this incentive * * * " (App. 368-69a). (Emphasis added.)

3. The proposition is advanced that evidence of blocking majority action in subcommittee meetings, as distinguished from Principals' meetings, is not sufficient to support the Commission's disapproval of the unanimity rule (Resp. Br. 45-48). But views expressed at subcommittee meetings reflect the position which each line has concluded to be in its best interests prior to any dilution of those views in an effort to reach unanimity (App. 127-28a). The Commission was entitled to rely on such evidence as expressing the independent business judgment of the majority.[6]

4. Respondents argue that a finding of "no evidence that a specific traveler has been persuaded to air travel *against his desires or to his disadvantage*" (Resp. Br. 44) (emphasis added) is inconsistent with the Commission's finding of diversion to air caused by the impact of the unanimity rule on agents. However, the Commission also found that "many potential travelers (the record shows somewhere between 15 and 60 per cent) come to travel agencies *undecided* as whether to go by air or sea" (App. 537a). (Emphasis added.) Diversion to air travel of these undecided travelers (which was not contrary to their desires or to their disadvantage) was found adversely to affect commerce and the public interest.

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[6] Minutes of Principals' meetings were either not available at all or, when available, uninformative as to what transpired at the meetings (*see* ASTA Br. 10, 13; App. 423a, 446-47a, 554a).

5. It is implied that without the unanimity rule each line might decide independently the amount of commissions to pay agents (Resp. Br. 39). This would not be possible under the Commission's order, which permits maximum commissions to be determined collectively by the conference (by a less than unanimous vote). The voting procedure authorized by the Commission remains more restrictive than that approved by the C. A. B. which gives each airline the right to act independently if agreement is not reached. *IATA Traffic Conference Resolution*, 6 C. A. B. 639, 645 (1946) (ASTA Br. 26).

IV. The Independent Ground on Which the Commission's Disapproval of the Unanimity Rule Should Have Been Affirmed Is Both Substantiated and Reviewable.

In *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962) (Resp. Br. 65-66), the Court decided that one of two different remedies chosen by the I. C. C. was not appropriate; and since the I. C. C. had made no findings to support the alternative remedy, the case was remanded for further proceedings.

In the instant case, the Commission disapproved respondents' unanimity rule on the ground, *inter alia*, that it had improperly frozen commissions, was an unwarranted invasion of antitrust principles and hence was contrary to the public interest. Having decided that the rule was excessively anticompetitive for this reason, the Commission did not have to decide whether the existence of interlocking directorates between certain respondents and their

airline competitors was a further anticompetitive reason for the rule's disapproval. But that relationship constitutes an additional factual basis, not in dispute, on which the identical remedy proposed by the Commission should have been affirmed by the court below.

No additional finding is required to conclude that a conference agreement giving veto power to such a competitor constitutes an "unwarranted invasion of the prohibitions of the antitrust laws" (App. 561a).[7] The agency's order can be upheld "on the same basis articulated in the order by the agency itself",[8] *i.e.*, that the rule's unwarranted anticompetitive effects are contrary to the public interest. The demonstrated proclivity for concerted action between these competitors (ASTA Br. 49-52) merely underscores the dangers to the public interest.

The basis for disapproval, however, is not that unlawful action had occurred, but that the relationship itself is beyond the jurisdiction of the Commission. It cannot approve collective action by air and sea carriers. And since the unanimity rule not only makes such collective action possible but also allows it to be covert, the rule's disapproval was required. Failure of the court below to recognize, and eliminate, this situation was reversible error.

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[7] Respondents contend that the rule of *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80 (1943) and *Chae-Sik Lee* v. *Kennedy*, 294 F. 2d 231, 234 (D. C. Cir.), *cert. denied* 368 U. S. 926 (1961) (Resp. Br. 66, n. 70) does not apply where there is a determination of fact "which only a jury could make". But here there is no dispute as to the existence of the interlocking relationships and hence no question of fact. The issue is one of law and should have been decided by the court below (*see* ASTA Br. 49-52).

[8] *Burlington Truck Lines, Inc.* v. *United States, supra* at 169.

CONCLUSION

Petitioner respectfully submits that respondents have advanced no reason in their brief why the judgment of the Court of Appeals should not be reversed and the order of the Federal Maritime Commission reinstated and affirmed.

Respectfully submitted,

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